

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-309

EDWARD J. WHITE, administrator,<sup>1</sup>

vs.

JOHN ALBERT JOHNSON & others.<sup>2</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Edward J. White, administrator of the estate of Lillian T. White (decedent), appeals from the allowance of the defendants' motions to dismiss. See Mass.R.Civ.P. 12(b)(1) & (6), 365 Mass. 754 (1974). White, a judgment creditor of Gina Giovangelo, contends that he was entitled to initiate an action on Giovangelo's behalf to recoup allegedly excessive fees charged by three lawyers who represented her (John Albert Johnson, Michael Hanley, and George Hassett; collectively, the attorney-defendants).<sup>3</sup> Because we conclude that White is not entitled to file a derivative action, we affirm.

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<sup>1</sup> Of the estate of Lillian T. White.

<sup>2</sup> Kathleen A. Hanley, personal representative of the estate of Michael Hanley; George P. Hassett, Jr., personal representative of the estate of George Hassett; and Gina Giovangelo.

<sup>3</sup> Two of the lawyers were deceased by the time the motions were decided.

Background. We take the following facts from the amended complaint and accept those facts as true on appeal. See Galiastro v. Mortgage Electronic Registration Sys., Inc., 467 Mass. 160, 164 (2014). On May 18, 2010, Giovangelo was operating her car when she struck and killed the decedent, who was operating her wheelchair in a crosswalk in Hyannis. The Commonwealth charged Giovangelo with multiple crimes, including operating while under the influence, leaving the scene of an accident, and operating to endanger. Giovangelo hired the attorney-defendants to represent her in the criminal matter. The attorney-defendants were paid a flat fee of \$108,094.88.

White filed a wrongful death action against Giovangelo on behalf of the decedent's estate. On April 23, 2012, judgment entered against Giovangelo in the amount of \$1,935,520.61. Despite White's demands for satisfaction of the judgment, only \$25,047.02 has been paid. The remainder of the judgment remains unsatisfied.

White then brought suit against two of the attorney-defendants (Johnson and Hassett), claiming the flat fee was excessive, and seeking to apply the fees to his judgment. The complaint alleged claims for fraudulent conveyance and unjust enrichment against the two attorney-defendants and Giovangelo. A Superior Court judge (first judge) dismissed the case insofar as it contained direct actions against the two attorney-

defendants, reasoning that there was no legal relationship between White and the attorney-defendants, and therefore he had no standing to claim that the fee was excessive. The first judge also found that there were no facts to support a claim of fraudulent conveyance. However, the first judge found the factual allegations to be marginally sufficient to make out what she loosely characterized as a "derivative" common-law claim of reach and apply, and gave White thirty days in which to file an amended complaint alleging common-law reach and apply.<sup>4</sup>

White filed an amended complaint, which, unlike the complaint, brought suit as "Edward J. White, Administrator, on behalf of Gina Giovangelo." White also named as defendants Giovangelo and the three attorney-defendants (or their personal representatives). The amended complaint labeled all of the counts as "derivative action to reach and apply -- unjust enrichment -- excessive fee." In allowing the motions to dismiss, a second judge concluded that White could not, as a judgment creditor, "step into [the] shoes" of Giovangelo in order to compel litigation against the attorney-defendants. He reasoned that such a lawsuit "is based on a legal theory that is subject to no obvious limiting principle."

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<sup>4</sup> The first judge noted that the complaint used the phrase "reach and apply" and described the property at issue as "funds (held) in constructive trust for the benefit of [White] as a judgment creditor of (Giovangelo)." The amended complaint did not allege a constructive trust.

Discussion. White does not challenge the dismissal of his complaint, which purported to allege a statutory reach and apply action, see G. L. c. 214, § 3, and fraudulent conveyance. Rather, he asserts that the judge should have permitted his amended complaint, alleging derivative claims, to go forward. "We review the allowance of a motion to dismiss de novo." Galiastro, 467 Mass. at 164. "We accept as true the facts alleged in the plaintiff['s] complaint as well as any favorable inferences that reasonably can be drawn from them." Ibid. However, "[w]e do not regard as 'true' legal conclusions cast in the form of factual allegations." Polay v. McMahon, 468 Mass. 379, 382 (2014), quoting from Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 39 n.6 (2009).

The essential allegation of the amended complaint is that "the court should allow the Plaintiff to act on behalf of his judgment debtor Gina Giovangelo to seek return of the funds she paid to the [attorney-defendants] that were in excess of a reasonable fee." The gravamen of White's argument on appeal is that a judgment creditor has the right to sue third parties on behalf of a judgment debtor. In pursuit of this argument, White analogizes to a variety of contexts, such as shareholder derivative claims, claims on behalf of condominium associations, claims against third parties based on agency, liability based on

master-servant and employer-employee relationships, and suits to enforce an insurer's duty to afford coverage.

In each of these situations, however, there is standing. See Brantley v. Hampden Div. of the Probate & Family Ct. Dept., 457 Mass. 172, 181 (2010) ("It is a general rule that, in order to have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury . . . . The complained-of injury must be a direct consequence of the complained of action" [quotation marks and citations omitted]). That is, the right to sue must be based, for example, on a statutory grant of standing, as in cases arising under the condominium statute<sup>5</sup> or insurance laws;<sup>6</sup> the assignment of a right of action;<sup>7</sup> a common-law duty flowing from a defendant to a plaintiff, as in shareholder derivative,<sup>8</sup> master-servant, or agency cases;<sup>9</sup> or be grounded in contract, as in cases involving

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<sup>5</sup> See G. L. c. 183A, § 10(b)(4); Cigal v. Leader Dev. Corp., 408 Mass. 212, 217-218 (1990).

<sup>6</sup> See G. L. c. 93A, § 9(1); G. L. c. 176D, § 3(9); Gore v. Arbella Mut. Ins. Co., 77 Mass. App. Ct. 518, 523-526 (2010).

<sup>7</sup> See Gore v. Arbella Mut. Ins. Co., 77 Mass. App. Ct. 518, 521 (2010).

<sup>8</sup> See Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 516-517 (1997).

<sup>9</sup> White relies on Hollywood Barbecue Co. v. Morse, 314 Mass. 368, 369-370 (1943) (master-servant), and Tenedios v. Wm. Filene's Sons Co., 20 Mass. App. Ct. 252, 257 (1985) (employer-employee). See Dias v. Brigham Med. Assocs., Inc., 438 Mass. 317, 319-324 (2002).

intended third-party beneficiaries,<sup>10</sup> including cases involving a creditor's rights as an intended creditor beneficiary.<sup>11</sup>

No such statutory or common-law duty exists here. There is nothing in the amended complaint that alleges a relationship between the attorney-defendants and Giovangelo that created a duty to White or the decedent. Likewise there is no allegation in the amended complaint (nor can there be) that the fee agreement was intended to benefit White or the decedent, or that White or the decedent relied on the fee agreement in any way. See Spinner v. Nutt, 417 Mass. 549, 555-556 (1994) ("The fact that third parties are thus benefited, or damaged, by [an] attorney's performance does not give rise to a duty by the attorney to such third parties, and hence cannot be the basis for a cause of action by the third parties for the attorney's negligence"). Compare Polito v. Galluzzo, 337 Mass. 360, 361-363 (1958) (injured party as third-party beneficiary of contract of insurance); Choate, Hall & Stewart v. SCA Servs., Inc., 378 Mass. 535, 543-544 (1979), quoting from 4 Corbin, Contracts § 787, at 95 (1951) (law firm as creditor beneficiary of settlement agreement providing for payment of its fees; "'If the

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<sup>10</sup> White relies on Polito v. Galluzzo, 337 Mass. 360 (1958), in which the insured brought a direct (not derivative) action to reach and apply the proceeds of an insurance policy as a third-party beneficiary of the policy.

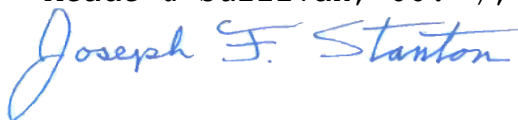
<sup>11</sup> See Choate, Hall & Stewart v. SCA Servs., Inc., 378 Mass. 535 (1979).

promisee in a contract contemplates the present or future existence of a duty or liability to a third party and enters into the contract with the expressed intent that the performance contracted for is to satisfy and discharge that duty or liability, the third party is a creditor beneficiary' entitled to enforce the contract").

White provides no authority for his contention that he is entitled to file an action against the attorney-defendants on behalf of Giovangelo. We decline to create the new cause of action that White seeks. See Spinner, supra.<sup>12</sup>

Judgment affirmed.

By the Court (Trainor,  
Meade & Sullivan, JJ.<sup>13</sup>),



Clerk

Entered: March 17, 2016.

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<sup>12</sup> White did not plead a claim of nonstatutory reach and apply independent of his derivative claim, nor does he make any argument to this effect in his appellate brief. "[F]ailure to address this issue on appeal waives [the] right to appellate review of the judge's ruling on the merits of the [claim]." Abate v. Fremont Inv. & Loan, 470 Mass. 821, 833 (2015). See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

<sup>13</sup> The panelists are listed in order of seniority.